Supreme Court, U.S.
FILED

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No. 02 76

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In The
Supreme Court of the United States

BRENT E. CALLENDAR,

Petitioner,

v.

THE STATE OF GEORGIA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Georgia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. FAILURE TO GRANT A SEVERANCE WHERE A CO-DEFENDANT REPEATEDLY COMMENTS ON THE PETITIONER'S SILENCE, AND PRESENTS A MUTUALLY EXCLUSIVE DEFENSE MUST BE REVIEWED UNDER THE STANDARD OF HARMLESS BEYOND A REASONABLE DOUBT.

II. WHERE TRIAL COUNSEL ADMITTED THAT HE FAILED TO INVESTIGATE THE APPLICABLE LAW, DESPITE A PRETRIAL WARNING BY CO-DEFENDANT'S COUNSEL, THE GEORGIA COURTS CANNOT PROPERLY FIND THAT THE DECISION NOT TO MOVE FOR SEVERANCE WAS EITHER REASONABLE OR INFORMED AS REQUIRED UNDER *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984).

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PETITION FOR A WRIT OF CERTIORARI

The Georgia Supreme Court handed down an opinion in the instant case that completely disregards this Court's decisions in *Chapman v. California*, 386 U.S. 18 (1967) and *Strickland v. Washington*, 466 U.S. 668 (1984).

OPINIONS BELOW

The opinion of the Georgia Supreme Court is reported at *Callendar v. State*, 275 Ga. 115, 561 S.E. 2d 113 (2002), and is attached as Appendix A of this Petition.

The denial of Callendar's motion for reconsideration by the Georgia Supreme Court is attached as Appendix B of this Petition.

JURISDICTION

The judgment of the Georgia Supreme Court was entered on March 11, 2002. *See Callendar v. State*, 275 Ga. 115, 561 S.E. 2d 113 (2002). Petitioner filed a timely motion for reconsideration with the Georgia Supreme Court which motion was denied on April 11, 2002. This petition for a writ of certiorari is filed within the allowable ninety (90) days, and the jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254, 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

Petitioner Brent Callendar was charged in five counts of a six-count indictment in DeKalb County Superior Court with felony murder, two counts of aggravated assault, and criminal damage to property in the first and second degrees. Co-defendant Sylvester Montgomery was jointly indicted with Callendar; Montgomery alone was also indicted for malice murder. The witnesses, police,

investigators, grand jury and District Attorney all believed that Montgomery was the individual who actually shot and killed the victim; the indictment was worded accordingly.

The petitioner and Montgomery were jointly tried by a jury on April 26-30, 1999. Presiding over the trial was a juvenile court judge, sitting by designation for the Superior Court judge assigned to the case. Montgomery was acquitted on all charges. Callendar was convicted and sentenced to life in prison, plus ten years.

The facts at trial were that on May 31, 1997, the petitioner, a twenty-six year old graduate from the Citadel in Charleston, South Carolina, and his date were at an Atlanta apartment where they had gathered with some friends. The couple left to go to a nearby package store. When they arrived, several men loitering in front of the store began to harass the petitioner and his date. The petitioner stopped to speak to someone he knew before he left, discussing a job lead that he had earlier provided the younger man. The petitioner and his girlfriend returned to the apartment and recounted the unpleasant encounter at the package store. The petitioner advised that he needed to return to the store to make an additional purchase before the store closed. Co-defendant Montgomery, one of many young men and women gathered at the apartment that night to watch a boxing match on television, asked if he could ride along, and climbed into the back seat of the petitioner's sports utility vehicle. When they arrived back at the store, one of the young men loitering in front flashed a weapon. Montgomery jumped out of the vehicle, grabbing an assault rifle he had apparently stashed in the rear of the sports utility vehicle and handed a handgun to the petitioner. Montgomery began shooting his weapon. He

shot Laderrius Harper, who was taken to the hospital, but survived his injuries. Harper spent many months in the hospital and underwent numerous medical procedures. Eventually he was released to recuperate further at home. Harper died of a "cardiac event" fifteen months after incurring the injury.

The forensic evidence was uncontroverted that no weapon other than the assault rifle was fired because a thorough investigation at the scene revealed four spent shell casings that came from an assault rifle, and no evidence that any other weapon had been fired. The physician who treated Harper testified that the wound was consistent with a wound from an assault rifle, not a handgun. Prior to the trial, counsel for co-defendant Montgomery contacted petitioner's counsel and advised him that he planned to comment on the petitioner's silence, failure to cooperate with police, to introduce his "bad" character, and to otherwise seek to confuse the jury into believing that petitioner, rather than Montgomery, was actually the shooter. Co-defendant's counsel even gave petitioner's counsel the citation for *United States v. De Luna*, 308 F. 2d 140 (5th Cir. 1962), and suggested that he use that authority in a pretrial motion for severance. No pretrial motion was filed.

At trial, the co-defendant's counsel followed through on his promise to intentionally and repeatedly assail and infringe upon this petitioner's fundamental constitutional rights. Petitioner's counsel was largely silent during these assaults. Eventually, at the express urging of the co-defendant's counsel, the petitioner's counsel made a mid-trial motion for severance. The belated motion was denied as the trial was nearly over. Petitioner's counsel further admitted, on the record during the trial, that he did

receive advance warning and the case citation from the co-defendant's counsel, but "did not follow up on it."

The issue of the court's denial of the motion for severance, as well as the ineffective assistance of trial counsel, were raised both in a Motion for New Trial and on direct appeal to the Georgia Supreme Court. The petitioner expressly noted in those briefs that the action of the trial court directly contravened the holding in *United States v. De Luna*, 308 F. 2d 140 (5th Cir. 1962), and the standard set forth by this Court in *Strickland v. Washington*, 466 U.S. 668 (1984). The Georgia Supreme Court summarily dismissed the issue, failing to even identify the correct legal standard applicable to petitioner's claims.

Petitioner respectfully submits that the Writ should be granted because the Georgia courts have ignored the decisions of the federal district courts, as well as this Court, in summarily denying his appeal. The protections of the Fifth and Sixth Amendments to the United States Constitution are clearly important federal rights which should not simply be ignored by the States.

REASONS FOR GRANTING THE PETITION

I. FAILURE TO GRANT A SEVERANCE WHERE A CO-DEFENDANT REPEATEDLY COMMENTS ON THE PETITIONER'S SILENCE, AND PRESENTS A MUTUALLY EXCLUSIVE DEFENSE MUST BE REVIEWED UNDER THE STANDARD OF HARMLESS BEYOND A REASONABLE DOUBT.

The Fifth Amendment to the United States Constitution protects the defendant in a criminal proceeding from

comments on his silence. *See Chapman v. California*, 386 U.S. 18, 24 (1967). Comment on this fundamental right is constitutional error of such magnitude that it must be deemed "harmless beyond a reasonable doubt" in order to affirm a conviction from a trial where such an error occurred. *Id.* at 26. Repetition of such comment, a clear denial of a fundamental constitutional right, "can no more be considered harmless than the introduction against the defendant of a coerced confession." *Id.* at 26, *citing Payne v. Arkansas*, 356 U.S. 560 (1958). Courts have uniformly held that this fundamental right applies not only to comments made by the prosecutor, but also to comments made by counsel for a co-defendant. *See United States v. Berkowitz*, 662 F. 2d 1127 (5th Cir. 1981); *United States v. De Luna*, 308 F. 2d 140 (5th Cir. 1962).

These Fifth Amendment protections are a federal constitutionally guaranteed right, made applicable to Georgia and every other state by the Fourteenth Amendment. *Chapman*, 386 U.S. at 19-20. Thus, whether or not the petitioner has been denied this right is "every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied." *Id.* at 21. Significantly, the State's own standard for reviewing such errors is inapplicable because the application by a state of its own harmless error rule applies only where that State is reviewing an error of state procedure or state law. *See Id.* at 20-21.

In the instant case, it is undisputed that counsel for the petitioner's co-defendant repeatedly commented on the petitioner's silence. It is further undisputed that defense counsel eventually moved for severance on this basis, albeit after the offending comments were made and

despite a pretrial warning of the impending assault by the counsel for the co-defendant. The Georgia Supreme Court, nevertheless, affirmed the conviction, holding that:

> It was not incumbent upon the trial court to order a severance sua sponte. *Worley v. State*, 237 Ga. 521 (1) (228 S.E. 2d 895) (1976); *Bishop v. State*, 223 Ga. App. 285 (477 S.E. 2d 422) (1996). And it cannot be said that the trial court abused its discretion in denying the motion to sever. After all, Callendar failed to make a clear showing of prejudice and a denial of due process protection. *Gee v. State*, 261 Ga. 178, 179 (3) (402 S.E. 2d 719) (1991); *Burgan v. State*, 258 Ga. 512, 516 (8) (371 S.E. 2d 854) (1988).

The Georgia court has set out a standard for reviewing this error of constitutional magnitude that does not correspond to the magnitude of the error or comport with that required by this Court.

> [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.

Chapman, 386 U.S. at 24. In *Chapman*, this Court noted that the best way to apply this test was to look at the actual comments complained of by the petitioner. In this case, the assault by co-defendant's counsel on this petitioner's silence began as early as opening statement:

> On the night in question, this man [indicating the petitioner] did not make himself available to the police. (TR at 23).
>
> After the officer interviewed Ms. Hopkins in October of 1997, and contacted Mr. Callendar [the petitioner], "Please come and talk to us. Please

> give us a statement. Please do something." He did nothing. (TR at 25).

On cross-examination of the petitioner, co-defendant's counsel continued for approximately 20 questions, each one aimed at commenting on the petitioner's failure to make a statement to the police:

Q. You didn't go to the police, did you?

Q. Well, did you go to the police in May 1997?

Q. June 1997?

Q. July 1997?

Q. August?

Q. September?

Q. October?

Q. November?

Q. December?

Q. So you didn't go to the police, not in 1997?

Q. And you didn't go in January 1998?

Q. February?

Q. March?

Q. April?

Q. May?

Q. June?

Q. July?

Q. August?

Q. September? It was October, 1998, is when you made contact with police, correct?

Q. Because you never volunteered any information, correct?

(TR at 871-873).

In *Chapman*, the California court's finding that the "proof of his guilt must have been overwhelming," did not absolve the State court of responsibility to review the federal issue under the federal standard of harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24, n.7. The co-defendant's repeated assault on the petitioner's Fifth Amendment right to be free from comment on his silence deprived this petitioner of his federally protected right to a fair trial. The Georgia courts did not and cannot "declare a belief that it was harmless beyond a reasonable doubt." *Id.* at 24.

> **Petitioners are entitled to a trial free from the pressure of unconstitutional inferences.**

Id. at 26 (emphasis added).

II. WHERE TRIAL COUNSEL ADMITTED THAT HE FAILED TO INVESTIGATE THE APPLICABLE LAW, DESPITE A PRETRIAL WARNING BY CO-DEFENDANT'S COUNSEL, THE GEORGIA COURTS COULD NOT FIND THAT THE DECISION NOT TO MOVE FOR SEVERANCE WAS EITHER REASONABLE OR INFORMED AS REQUIRED UNDER *STRICKLAND V. WASHINGTON*, 466 U.S. 668 (1984).

The right to effective assistance of counsel is a right guaranteed by the Sixth and Fourteenth Amendments to

the United States Constitution. The right to counsel plays a crucial role in the adversary system and is necessary to afford the defendant ample opportunity to meet the case of the prosecution. *See Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052 (1984).

The Supreme Court identified a two-step standard for evaluating ineffective assistance of counsel claims in *Strickland*, 466 U.S. at 695. First, counsel's performance must have been deficient. Secondly, there must a reasonable probability that but for counsel's error, the results would have been different. The Court defined reasonable probability not necessarily as a showing of a completely different result, but rather as **a probability sufficient to undermine confidence in the outcome**. The Court emphasized that counsels' overreaching duty is to "advocate the defendant's cause . . . to bring to bear such skill and knowledge as will render the trial a reliable testing process." *Id.* at 688. The Court added that the standards do not establish mechanical rules and the ultimate focus of the inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. *See Id.* at 670.

The Georgia court failed to set out the *Strickland* standard, failed to mention the reasonableness requirement, undertook no discussion of the facts, and made no effort to apply the facts to the clear federal law on this issue. With regard to the second prong of *Strickland*, known as the prejudice prong, the Georgia court used a standard of whether it was "highly unlikely that the [petitioner] would have been acquitted in the absence of Montgomery's counsel's questions and comments." *Id.* at 67.

In this case, counsel for the co-defendant advised petitioner's counsel, in advance of trial, that he was intending to infringe on the petitioner's right to be free from comment on his silence, and to present a mutually exclusive, and entirely antagonistic defense. At a hearing on the petitioner's motion for new trial, the co-defendant's counsel testified:

> In speaking with Mr. Hancock the first time, I, out of professional courtesy or deference, intimated to him that he should file a severance from us to get away from my defense of Mr. Montgomery . . .
>
> The second time I spoke with him, again I brought up the issue of severance, that he should get away from us, get away from Mr. Montgomery, and I also cited to him a case [*United States v. De Luna*, 308 F. 2d 140 (5th Cir. 1962)] . . .

The co-defendant's counsel further advised petitioner's counsel that he planned to directly comment on the petitioner's silence, to bring his character into issue, to attempt to use petitioner's statement to police (which was suppressed), and to fabricate a theory of defense that accused the petitioner of being the shooter, when in fact the co-defendant was the shooter.

> The theory of our case was basically a figment of my imagination. I basically came up with some angles that I thought I could pursue for my client. So, it was a theory that I basically created, and that theory was to place the blame on Mr. Callender.

Finally, the co-defendant's counsel affirmed that had petitioner's counsel filed a pretrial motion for severance, he would have proffered to the trial court that he "was

planning to violate the constitutional rights of Mr. Callendar . . ."

At trial, petitioner's counsel admitted that he had been told about the co-defendant's theory of defense, and of the *De Luna* case:

> And I'll be honest with you, I did not – Mr. Johnson's correct. He did mention the case. I did not follow up on it.

At that point in the trial, the co-defendant's attorney suggests on the record that the petitioner move for a mistrial. Only then, does the petitioner's attorney move for the desperately needed severance.

By co-defendant's counsel:

> Judge, as an officer of the court and also as a defense attorney, I do not wish to vicariously convict Mr. Callendar. And I say that to say, Judge, if Mr. Hancock wishes to move for a severance right now, you know, I would not have any objection to that. And he can be heard on that.

. . . .

By petitioner's counsel:

> And obviously I would. That is something that as the trial progressed I played more and more with.

The trial court denied the motion.

In this case, the Georgia Supreme Court completely ignored the entire colloquy that transpired at trial regarding why petitioner's counsel did not move for severance pretrial – "I did not follow up on it." Instead, they seized upon and relied entirely on one statement at the hearing

on the motion for new trial, where trial counsel made the conclusory assertion that it was a strategic decision. Putting aside for the moment the truth of that statement in the face of all the other evidence presented, that standard is not the proper standard for reviewing the effectiveness of counsel. The Georgia court's statement of the law is partially correct, "informed strategic decisions do not amount to inadequacy under *Strickland*." However, that is not the entire standard of review, as set out in *Strickland*. In *Strickland*, the United States Supreme Court stated that strategic decisions made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. *Strickland*, 466 U.S. at 690-1. Consequently, in this case, where trial counsel admitted that he never even followed up on the *De Luna* case, or the advance information that the co-defendant's counsel had provided as to his trial strategy, the petitioner's counsel could not possibly have been making an "informed" strategic decision.

It is not sufficient to simply invoke the term "strategic decision," in order to avoid a finding of ineffectiveness. The court must determine, in light of all the circumstances, whether the identified act or omission was outside the wide range of professionally competent assistance. *See Pavel v. Hollins*, 261 F. 3d 210 (2d Cir. 2001), *citing Strickland*, 466 U.S. at 690. "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. Counsel cannot be said to have made the requisite reasonable, informed strategic choice if he has failed to first investigate the facts and law applicable to the case. *See Phoenix v. Matesanz*, 233 F. 3d 77 (1st Cir. 2000); *Moore v.*

Johnson, 194 F. 3d 586 (5th Cir. 1999); *United States v. Gray*, 878 F. 2d 702 (3rd Cir. 1989); *United States v. Dawson*, 857 F. 2d 923 (3rd Cir. 1988).

> The Court is, therefore, not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel where it appears on the face of the record that counsel made no strategic decision at all.

Moore v. Johnson, 194 F. 3d 586 (5th Cir. 1999).

In rendering its decision, the Georgia Supreme Court failed to set forth the correct legal standard, or to mention any of the record facts relevant to that standard. As discussed above, trial counsel admitted on the record at trial that he had simply failed to follow up on the issue of severance, or to even read the relevant caselaw. The record also reflects that trial counsel was unaware that a witness can only be impeached with a certified record of his prior conviction; that he was not required to provide the prosecutor advance notice that his client would testify by including the petitioner on the witness list; and, that the petitioner has a right to be free from comment on his silence by a co-defendant. Having failed to follow up on the citation provided him by the co-defendant's counsel, trial counsel was also unaware that the co-defendant's right to confrontation at a joint trial would permit him to cross-examine the petitioner on otherwise inadmissible matters. Trial counsel also told the jury in opening statement that the defense would call an expert to refute the cause of death. No expert had ever been retained or consulted by the defense. Trial counsel also filed the Notice of Appeal in the wrong court, and moved for an appeal bond, apparently unaware that same is not available in felony murder

cases. Thus, the record is replete with examples of trial counsel's ignorance and lack of diligence.

A finding of prejudice requires only a showing that counsel's errors deprived the defendant of a trial whose result is reliable. *See Dawson*, 857 F. 3d at 929, *citing Strickland*, 466 U.S. at 687. The seriousness of the charges against the defendant is a factor that must be considered in assessing counsel's performance under both prongs of *Strickland*. *See Proffit v. Wainright*, 685 F. 2d 1227, 1247 (11th Cir. 1982), *cert. denied*, 464 U.S. 1002 (1983). In this case, the charge is murder. The petitioner received a sentence of life, plus ten years.

The Georgia courts have failed to identify and apply the correct legal standard of review for either prong of the *Strickland* test. Claims of ineffective assistance of counsel are federal claims that must be reviewed under the standards set by the United States Supreme Court, not under less stringent standards set by the States themselves.

CONCLUSION

The Georgia Supreme Court has decided an important federal constitutional question in a way that conflicts with this Court's prior decisions, as well as those of numerous federal circuit courts. Because the Georgia court's decision is flatly contrary to this Court's controlling precedent, this Court should grant this petition for a writ of certiorari and reverse the decision of the Georgia Supreme Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

In the Supreme Court of Georgia

Decided: MAR 11 2002

S01A1292. CALLENDAR v. THE STATE.

THOMPSON, Justice.

Defendant Brent Callendar was convicted of felony murder, two counts of aggravated assault, and two counts of criminal damage to property, in connection with a shootout at a package store.[1] He appeals, asserting, inter alia, that the trial court should have severed his trial from that of his co-defendant, Sylvester Montgomery, who was acquitted. We find no error and affirm.

1. Viewing the evidence in a light to uphold the verdict, we find the following: When Callendar and Makia Hopkins went to a package store, several men standing outside of the store commented on Hopkins' looks. Angered, Callendar left with Hopkins; they went to a friend's apartment where Callendar asked for, and was given, a

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[1] The crimes occurred on May 31, 1997. Callendar was charged with the felony murder of Laderrius Harper, the aggravated assault of both Harper and Maurice Cherry, criminal damage in the first degree with regard to the property of Franklin Bolton, and criminal damage in the second degree with regard to the property of Nicole Felton. Trial commenced on April 26, 1999, and the jury returned its verdict on April 30, finding Callendar guilty on all counts. The trial court sentenced Callendar to life in prison for the felony murder of Harper, ten years consecutive for the aggravated assault of Cherry, one year concurrent for criminal damage in the first degree and twelve months concurrent for criminal damage in the second degree. Callendar's timely filed motion for a new trial was denied on March 27, 2001, and Callendar filed a notice of appeal on April 20, 2001. The case was docketed in this Court on May 23, 2001, and orally argued on September 17, 2001.

pistol. Joined by Montgomery, who carried an assault rifle, Callendar and Hopkins returned to the store in a vehicle which Callendar had been driving. Callendar "whipped" into a parking space; then he and Montgomery got out of the vehicle, brandishing their weapons. The men in front of the store started to run. Callendar called out, "Why are y'all disrespecting my girl?" Then Callendar and Montgomery started shooting. Two men ran across the street; one of them, Laderrius Harper, was shot; he died of his wounds 14 months later. Another bullet pierced an automobile.

Before leaving the scene, Callendar approached a woman who was screaming as she sat in a car. He slammed the handgun against the windshield of the car and shattered it. Then he and Montgomery returned to the vehicle in which they came. They drove off with Hopkins.

The evidence was sufficient to enable any rational trier of fact to find Callendar guilty beyond a reasonable doubt of the crimes for which he was convicted. That Montgomery may have fired the shot which hit Harper is of no consequence because the evidence demonstrated that Callendar and Montgomery acted in concert. *Royal v. State,* 266 Ga. 165, 166 (1) (465 SE2d 662) (1996); *Arrington v. State,* 244 Ga. App. 529, 531 (536 SE2d 212) (2000).

2. Callendar asserts the trial court erred in failing to order that he and Montgomery be tried separately. This assertion is predicated upon the fact that, when Callendar testified, Montgomery's counsel asked Callendar why he did not volunteer any information about the shootout until the police contacted him, more than a year later. We find no error.

Pretermitting the question of whether counsel for one defendant can comment on another defendant's exercise of the right to remain silent prior to his arrest,[2] we note first that Callendar did not object or move for a severance in response to Montgomery's counsel's questions. In fact, he did not move to sever until later in the trial.[3]

It was not incumbent upon the trial court to order a severance sua sponte. *Worley v. State,* 237 Ga. 521 (1) (228 SE2d 895) (1976); *Bishop v. State,* 223 Ga. App. 285 (477 SE2d 422) (1996). And it cannot be said that the trial court abused its discretion in denying the motion to sever. After all, Callendar failed to make a clear showing of prejudice and a denial of due process protection. *Gee v. State,* 261 Ga. 178, 179 (3) (402 SE2d 719) (1991); *Burgan v. State,* 258 Ga. 512, 516 (8) (371 SE2d 854) (1988).

The mere fact that Montgomery tried to pin the blame on Callendar was not sufficient in itself to show a denial of due process. *Cain v. State* 235 Ga. 128, 129 (218 SE2d 856) (1975); *Chandler v. State,* 213 Ga. App. 46 (1) (443 SE2d 679) (1994). Moreover, with only two defendants, there was virtually no likelihood that the jury would confuse the evidence or the law, or that the evidence against one defendant would be considered against the other. See *Linares v. State,* 266 Ga. 812, 815 (4) (471 SE2d 208) (1996).

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[2] See *Chapman v. State,* 263 Ga. 393 (1) (435 SE2d 202) (1993), citing *Mallory v. State,* 261 Ga. 625, 629 (5) (409 SE2d 839) (1991); *Graham v. State,* 156 Ga. App. 538, 539 (2) (275 SE2d 114) (1980).

[3] Between the time that Callendar was cross-examined and his counsel moved to sever, four witnesses took the stand and testified.

3. Callendar claims his trial counsel, Phillip Hancock, was ineffective in numerous respects: (a) failing to file a motion to sever; (b) failing to move for a mistrial when Montgomery's counsel commented on Callendar's failure to come forward; (c) failing to present a theory of defense in the opening statement, and promising evidence in that statement that was not produced; (d) failing to prepare adequately for trial; and (e) failing to request jury instructions on alternative defenses. In reviewing these claims, we give deference to the trial court's factual findings, which are to be upheld on appeal unless clearly erroneous; however, we give no such deference to the trial court's legal conclusions. *Suggs v. State,* 272 Ga. 85, 88 (526 SE2d 347) (2000). Giving the trial court's factual findings the deference they are due, we conclude that Hancock did not render ineffective assistance of counsel.

(a) Hancock testified that he did not move to sever the trial because he believed that it would be better for Callendar to be tried along with Montgomery, who, it appeared, "actually did the shooting . . . and killed [the victim]." With the benefit of hindsight, it would appear that this strategy may have backfired. But that is not to say that it was ineffective.

> Informed strategic decisions do not amount to inadequacy under *Strickland.* [Cit.] "The fact that appellant and his present counsel now disagree with the difficult decisions regarding trial tactics and strategy made by trial counsel does not require a finding that appellant received representation amounting to ineffective assistance of counsel."

DeYoung v. State, 268 Ga. 780 (5) (493 SE2d 157) (1997).

(b) Callendar asserts Hancock was ineffective because he failed to object or move for a mistrial when Montgomery's counsel questioned Callendar as to when he spoke to the police, and commented upon his refusal to come forward. We disagree.

"The standard for determining ineffective assistance of counsel is whether trial counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defense." *Woods v. State,* 271 Ga. 452, 453 (2) (519 SE2d 918) (1999), citing *Strickland v. Washington,* 466 U.S. 668 (104 SC 2052, 80 LEd2d 674) (1984). Even if it can be said that Hancock's failure to preserve this issue for appeal constituted deficient performance, Callendar cannot demonstrate that he was prejudiced. The evidence against Callendar was overwhelming and it is highly unlikely that he would have been acquitted in the absence of Montgomery's counsel's questions and comments. See *Landers v. State,* 270 Ga. 189, 191 (4) (508 SE2d 637) (1998).

(c) Hancock did present a theory of defense in his opening statement. He told the jurors that Callendar did not participate in the shooting; that he was surprised – and actually hid – when shots were fired; and that he did not fire his weapon.

Hancock also told the jurors that he believed the evidence would show that the victim did not die from his wounds. At the hearing on the motion for a new trial, Hancock testified that he had hoped to present expert testimony on that point, but he was unable to do so. Even if Hancock's performance was deficient in this regard, it did not affect the outcome of the trial. See *Landers v. State,* supra. The State's own expert opined that the victim

died as a result of a "cardiac event . . . *probably* because of the amount of strain" associated with his long recovery. (Emphasis supplied.)

(d) Callendar asserts Hancock's ineffectiveness was apparent in numerous other respects, to wit: he listed Callendar as a witness, filed a notice of appeal in the wrong appellate court, sought an appeal bond, failed to make effective use of witness statements and discovery materials to impeach witnesses, failed to prepare Callendar adequately to testify, and neglected to visit the scene of the crime. However, even if, as Callendar contends, these errors show Hancock was "clearly unprepared" to defend him, see *Johnson v. State,* 266 Ga. 380, 383 (467 SE2d 542) (1996), it cannot be said that, absent these errors, there is a reasonable likelihood that the outcome of the trial would have been different. *Hayes v. State,* 263 Ga. 15 (426 SE2d 557) (1993).

(e) Hancock was not ineffective for failing to request charges on voluntary manslaughter and justification. Hancock testified at the hearing on the motion for a new trial that he believed those defenses were inconsistent with Callendar's defense that he did not participate in the shooting. Besides, the evidence did not support a voluntary manslaughter or justification charge.

4. Taken as a whole, the trial court's charge and recharge did not overemphasize conviction at the expense of acquittal. Nor, when viewed in conjunction with the verdict form, did it leave the jury with the impression that it had to find Callendar guilty on all counts or not guilty on all counts, thereby omitting the possibility that it could

find him guilty on some counts and not others. *Sweat v. State,* 203 Ga. App. 290, 292 (5) (416 S.E.2d 845) (1992).

Judgment affirmed. All the Justices concur.

APPENDIX B

SUPREME COURT OF GEORGIA

Case No. S01A1292 Atlanta, April 11, 2002

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

BRENT E. CALLENDAR V. THE STATE

Upon consideration of the Motion for Reconsideration filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I hereby certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ *Sherie M. Welch, Clerk*